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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JESUS ALVAREZ MEJIA, Defendant and Appellant.	F038504 (Super. Ct. No. CR02252) **OPINION**

APPEAL from a judgment of the Superior Court of Madera County. David D. Minier, Judge.

James R. Homola, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, John G. McLean and Daniel Bernstein, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Jesus Alvarez Mejia (Mejia) was charged with one count of first-degree murder and one count of attempted premeditated murder. At the preliminary hearing, his then-girlfriend testified to events surrounding the alleged murder. Between the time of the preliminary hearing and the trial, the witness moved to Mexico and did not return for the trial. She was found by the trial court to be unavailable and her testimony from the preliminary hearing was read into evidence under the former testimony exception to the hearsay rule. Mejia appeals his conviction claiming his Sixth Amendment right to confront witnesses was impermissibly infringed by the admission of the former testimony. He also contends the trial court erred by refusing to give jury instructions on self-defense. We disagree with both contentions and will affirm the judgment.

PROCEDURAL SUMMARY

On August 25, 1999, a two-count information was filed in Madera County charging Mejia with first-degree murder and attempted murder. Count one alleged the murder of Francisco Tovar (Chico[1]) in violation of Penal Code section[2] 187, subdivision (a). It was further alleged, with respect to count one, that Mejia personally and intentionally used a firearm within the meaning of section 12022.53, subdivision (d). Count two alleged the attempted first degree murder of Alfredo Guzman (Guzman) in violation of section 664/187 subdivision (b) and specially alleged the personal use of a firearm within the meaning of section 12022.53, subdivisions (b) and (e)(1).

Mejia's then-girlfriend, Flor Figueroa (Figueroa) testified at the preliminary hearing, which was held on August 20, 1999. In January, 2000, Figueroa went to

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1 We use the decedent's nickname and the first names of his brothers, Silviano Fernandez-Tovar and Rogelio Fernandez, to avoid confusion and to be consistent with the use of names in the record so far as is possible. No disrespect is intended.

2 All references to code sections are to the Penal Code unless otherwise stated.

Mexico and did not return. The People moved in limine, pursuant to Evidence Code section 1291, to admit Figueroa's former testimony. The court found Figueroa was unavailable within the meaning of Evidence Code section 240 and granted the motion Following the grant of the motion to admit former testimony, Mejia moved to continue the proceedings in order to allow the prosecution to attempt to secure Figueroa's attendance at trial. The motion to continue was denied.

Following a jury trial, Mejia was convicted of both counts, and the allegations of personal use of a firearm with respect to both counts were found true. Mejia was sentenced to a determinate term of 10 years for the gun use enhancement in count two pursuant to section 12022.53, subdivision (b). He was sentenced to a consecutive indeterminate term of life in prison with possibility of parole on the substantive conviction of attempted murder. On count one, Mejia was sentenced to consecutive terms of 25 years to life with possibility of parole on both the substantive conviction and the personal use enhancement pursuant to section 12022.53, subdivision (d).

FACTUAL SUMMARY

I. *Murder of Tovar and Attempted Murder of Guzman*

Rogelio Fernandez-Tovar (Rogelio) owned property in Madera County on which were situated a barn and corrals for horse training. On the morning of June 11, 1999, Silviano Fernandez (Silviano), Rogelio's brother, was working a horse on the property. Guzman, who also kept a horse on the property, arrived about 9:30 a.m. Between 11:30 a.m. and 12:00 noon, Chico and Mejia and one or two other people arrived.

Mejia sought to make a deal with Guzman whereby Mejia would trade his van for one of Guzman's horses. Guzman did not want to trade but Mejia was insistent and Guzman eventually agreed to the deal. Later, Mejia proposed a wager where the ownership of both the horse and the van would be decided by a toss of a coin. Again, Guzman did not want to wager, but was eventually persuaded. Guzman won the toss of the coin. Mejia became angry at the results and, after arguing awhile, challenged

Guzman to a fight. Guzman refused to fight and Mejia eventually walked away with Chico to his house, which was close-by.

About 7:00 p.m., Guzman and Rogelio went to get some chicken from the store. When they returned, several people sat in the shade of some trees and ate and drank beer. About an hour later, they heard shots. Immediately thereafter, Figueroa warned the group "Be careful because [Mejia has] already killed one man and wants to kill the other one." (RT 350) Soon thereafter, Mejia ran up to Guzman, pointed an automatic pistol at Guzman's chest and pulled the trigger three times. The gun did not fire because it had jammed. Mejia also pointed the pistol at two other people but the gun did not fire. Rogelio and Silviano tackled Mejia, disarmed him and held him until the sheriff's officers arrived.

Dr. Jerry Nelson (Nelson), a pathologist, testified that Chico had suffered two gunshot wounds, either of which would have been fatal. Nelson testified that the trajectory of the first gunshot, which entered through the shoulder and exited through the mouth, would have been an unlikely result had there been a hand-to-hand struggle. He testified the second gunshot, which entered at the back of the head, could not possibly have been inflicted as a result of a hand-to-hand struggle. Nelson stated the second shot was more consistent with the theory that Chico was facing away from Mejia when the shot was fired.

II. *Figueroa's Testimony*

Figueroa testified at the preliminary hearing that she and Mejia's brother were at the residence she and Mejia shared when Mejia came home with Chico. After going for a swim and eating some food, Mejia told Figueroa he had lost the van in a wager involving the toss of a coin. Figueroa walked over to Rogelio's property where the others were to talk to some of the women about what had happened. She testified that she suggested to the other women that the men should talk over what had happened the following day when they were sober.

As Figueroa was walking back, she met Mejia, Chico and Chico's son, Mickey. Mejia and Chico were arguing or talking loudly and Chico was ordering Mejia to return to the house. Figueroa overheard Mejia say that if Chico didn't let go of him, he was going to kill Chico. Chico responded by saying "kill me, kill me." Figueroa saw Mejia pull out the pistol he was carrying. She testified the two started wrestling over the pistol. She ran for help and heard shots when she was too far away to see what had happened. Figueroa testified she did not see the shots fired. She ran back to the residence with Mejia's son who called the police.

III. ***Evidence of Figueroa's unavailability***

Angelica Reyes, Mejia's sister, testified that Figueroa left California for Mexico on January 3, 2000. Reyes testified Figueroa had told her she did not want to be in the United States any longer and did not intend to return after going back to Mexico. Reyes had not seen Figueroa from early January to the time of the trial

Fabian Benabente, an investigator for the Madera County District Attorney's office, testified he had served a subpoena on Figueroa in November 1999 to appear on the original trial date of January 30, 2000. Benabente testified he talked to Figueroa prior to her leaving in January and she told him she was going to Los Angeles but was planning to return for the trial. He testified he did not see Figueroa in court on January 30, 2000. Benabente returned to Figueroa's last known address in Madera to serve a subpoena for the April 30, 2000 trial date. A neighbor told him that Figueroa had left for Mexico and he was given two addresses in Mexico where the neighbor believed she could be reached. Benabente made no effort to contact Figueroa in Mexico. Benabente testified he did not attempt to contact Figueroa because he felt she had left the United States in order to avoid having to testify. He felt the effort to locate and serve Figueroa would be futile.

IV. ***Ruling on Figueroa's unavailability***

Following argument on the motion to admit prior testimony, the court found that a good faith effort to obtain the attendance of Figueroa at trial had been made. The court

agreed there was little likelihood that Figueroa's attendance could have been obtained through the Mexican consulate or by any other official or non-official means. The court took judicial notice of pervasive bribery and corruption in the Mexican legal system.

V. *The Defense Case*

Mejia testified at trial that he had made a deal with Guzman, trading his trailer for Guzman's horse. Mejia also testified there had been a winner-take-all bet on the flip of a coin, but that Guzman had called off the bet while the coin was in the air. Mejia further testified that after he had finished swimming and eating, he went outside to look for his children and saw Chico by the open door to the pool house. When Mejia approached, he saw the pistol, which Mejia claimed to have sold to Chico's father, inside a box in the pool house. Mejia testified he took the pistol and stuck it in his waistband and started off with the intent of returning both the pistol and Chico to Chico's father's house.

Mejia testified that Chico, for reasons that are not clearly explained, tried to grab the pistol from Mejia and a wrestling match ensued. The pistol fell to the ground and they both tried to pick it up. Mejia testified that when he was poked in the eye during the wrestling match, the gun went off. Mejia denied he ever pulled the trigger on the pistol or intended it to go off. He claimed the firing of the pistol was an accident and that he did not intend to hurt anyone. Mejia's argument during closing was consistent with his testimony that the pistol had discharged accidentally.

DISCUSSION

Mejia maintains his Sixth Amendment right to confront witnesses was impermissibly infringed when the trial court admitted evidence of Figueroa's prior testimony. Mejia makes essentially two arguments. First, he argues there was no competent testimony or evidence to prove that Figueroa was unavailable. Second, he contends the People failed to demonstrate due diligence in their efforts to secure Figueroa's presence at trial. Mejia also claims the trial court erred prejudicially when it refused to give a jury instruction on self-defense.

I. *Prior Testimony was Erroneously Admitted*

At trial, the People moved, pursuant to Evidence Code section 1291, to admit Figueroa's prior testimony given during the preliminary hearing. "[W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause [of the Sixth Amendment] normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability may be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." (*Ohio v. Roberts* (1980) 448 U.S. 56, 66.)

"Evidence Code section 1291 allows the use of former testimony if the witness is unavailable and the party against whom the former testimony is offered was a party to the proceeding in which the former testimony was given and had the right to confront and cross-examine the witness." (*People v. Sandoval* (2001) 87 Cal.App.4th 1425, 1433-1434 [fn. omitted] (*Sandoval*).) Thus, *Ohio v. Roberts* establishes a two-pronged test to determine the admissibility of prior testimony. The second prong, reliability, is satisfied if the testimony fits within the hearsay exception established by Evidence Code section 1291. (*Sandoval, supra*, 87 Cal.App.4th at pp. 1433-1434.)

Figueroa's testimony meets the reliability standard since the evidence was offered at trial against Mejia, who was also a party in the preliminary hearing. It is uncontested that Mejia had both the motive and opportunity to cross-examine Figueroa. The sole issue on appeal, therefore, is whether the People used due diligence in trying to procure Figueroa's presence at trial.

A. The Record Does Not Reflect Due Diligence

It is now well-settled that the trial court's determination of due diligence is subject to "independent, de novo, review rather than the more deferential abuse of discretion test." (*People v. Cromer* (2001) 24 Cal.4th 889, 893.) While the term "due diligence" is incapable of mechanical definition, the California Supreme Court has provided guidance as to what factors should be considered. "Relevant considerations include ' "whether the

search was timely begun"' [citation], the importance of the witness's testimony [citation], and whether the leads were competently explored [citation]." (*Id.* at p. 904.)

The leads Benabente received from Figueroa's neighbor were not explored at all. Once he was given the addresses in Mexico, Benabente did nothing further to attempt to secure Figueroa's presence. The People claim that once it was ascertained that Figueroa had gone to Mexico with the apparent intent of staying there, no further effort was required. We disagree.

In *Sandoval*, the prosecution declined to provide monetary assistance to, or to facilitate the application for a visa of a witness in a murder case who had gone to Mexico. (*Sandoval, supra*, 87 Cal.App.4th at p. 1432.) In concluding there had not been due diligence in securing the witness's presence, the Third District Court of Appeal concluded that a potential witness was not per se unavailable because they had gone to Mexico. (*Id*. at p. 1444.) In reaching this conclusion, the court in *Sandoval* noted that the Treaty on Cooperation Between the United States of America and the United Mexican States for Mutual Legal Assistance[3] (Treaty) has changed the circumstances so that a Mexican national residing in Mexico may no longer be considered per se unavailable. (*Id.* at pp. 1440, 1442-1444.) Thus, to the extent pre-Treaty cases have suggested or concluded that the demands of due diligence are satisfied by showing the witness is living in a foreign country and therefore beyond the court's process, those cases are no longer applicable to show there is per se unavailability where the witness is living in Mexico. (See, e.g. *People v. Ware* (1978) 78 Cal.App.3d 822, 833 [resident of Spain beyond court's process and therefore unavailable]; *People v. St. Germain* (1982)

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3 Mexico-United States: Mutual Legal Assistance Cooperation Treaty, December 9, 1987, Senate Treaty Document No. 100-13, effective May 3, 1991, 27 I.L.M. 443.

138 Cal.App.3d 507, 518 [resident of Holland]; *People v. Denson* (1986) 178 Cal.App.3d 788, 792 [resident of England].)

The Third District Court of Appeal concluded in *Sandoval* that, although the Treaty does not necessarily provide a means to compel the attendance of a Mexican resident in a United States proceeding, it does, nonetheless, provide avenues whereby attendance may be facilitated and encouraged. (See *Sandoval*, *supra*, 87 Cal.App.4th at p. 1440-1443.) "[A] good faith effort must be undertaken even though the court itself does not have the power to compel the attendance of the witness." (*Id*. at 1441; *Barber v. Page* (1968) 390 U.S. 719, 724.) Thus, a good faith effort to contact Figueroa was required even though she was currently residing in Mexico.

The People contend that once Benabente received information that Figueroa had moved to Mexico, no further effort to contact her was required because any further effort would have been futile. The conclusion that further effort would have been futile was apparently based on the fact Figueroa told Benabente in December 1999, that she was traveling with her family only as far as Los Angeles and that she would return in time for the trial. From this, Benabente appears to have concluded Figueroa was lying and intended to stay in Mexico and avoid the trial altogether.

While due diligence demands only that reasonable steps to secure the witness's presence be taken and that steps that would be futile are not required, (*Ohio v. Roberts, supra*, 448 U.S. at pp. 62-77,) the futile nature of any further effort must be objectively evident. It is not sufficient merely to assert a subjective sense of futility in continuing the effort. (*McHugh v. County of Santa Cruz* (1973) 33 Cal.App.3d 533, 539-540.)

Contrary to the People's contention, there is no evidence that continuing effort to contact Figueroa would have been unavailing in securing her presence at trial. That Figueroa told Benabente she would come back for the trial but did not is not proof that she would continue to resist efforts to procure her presence or that she would refuse future requests to be present. "[T]he possibility of refusal is not the equivalent of asking

and receiving a rebuff."[4] (*Barber v. Page, supra*, 390 U.S. at p. 724.) The prosecution had clear leads indicating where Figueroa might be located in Mexico. The prosecution could at least have ascertained her stated intentions by procuring the telephone numbers corresponding to the addresses provided and calling. That they did not pursue this simple and reasonable expedient evinces a failure adequately to follow up on the available leads.

The People do not contend that there was insufficient time to attempt to track down Figueroa in Mexico. On January 30, 2000, the People requested and received a continuance of the trial date until April 3, 2000. Benabente was on notice early in January 2000, that Figueroa was going to Mexico and there might be difficulty in ascertaining both her whereabouts and her cooperation. By the first trial date of January 30, he had an indication she had already departed. He did not attempt to contact Figueroa again until the early part of March 2000. On March 20, 2000, Benabente made contact with Figueroa's neighbors who gave him two addresses where she might be reached in Mexico. From these facts we conclude that, to the extent enlisting the help of Mexican authorities might have been helpful in procuring Figueroa's presence at trial, there was undue delay in instituting the search. There was, however, ample time to attempt contact with Figueroa through non-official channels, such as by telephone.

Our consideration of two of the three factors[5] set forth in *People v. Cromer, supra*, 24 Cal.4th at p. 893, leads us to conclude the People failed to demonstrate due diligence

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[4] This same principle leads us to conclude the trial court's finding that efforts to approach Figueroa through official channels would be futile because the Mexican legal system is hopelessly corrupt was improvident. Where the United States has seen fit to enter into a treaty to promote a particular end, trial courts and law enforcement agencies are not free prospectively to deem all effort to achieve that end futile without any resort to the mechanisms the treaty offers.

[5] We give consideration to the third factor, importance of the evidence, in part B, *infra.*

in procuring Figueroa's presence at trial. Consequently, Figueroa's prior testimony was admitted in violation of Mejia's Sixth Amendment right of confrontation. Because we conclude the prior testimony was erroneously admitted on grounds of failure to show due diligence, we need not consider whether the fact of Figueroa's absence was demonstrated by competent evidence.

B. The Erroneous Admission of Figueroa's Prior Testimony was Harmless

Where a defendant's rights under the confrontation clause are offended, reversal is not required if the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *Lilly v. Virginia* (1999) 527 U.S. 116, 139-140 [applying the *Chapman* standard to confrontation clause violations].)

Figueroa's prior testimony was, at most, equivocal with respect to Mejia's guilt or innocence. Her testimony tended to confirm most of Mejia's account of what Mejia did from the time he went back to his house until he headed back toward the group with Chico. Figueroa's testimony contradicted Mejia's only where she testified Chico was trying to direct Mejia back to his house and Mejia threatened to kill Chico if he did not stop trying to restrain Mejia. Consistent with Mejia's testimony, Figueroa testified she saw the two wrestling over possession of the gun. She did not actually see the gun go off. Figueroa's testimony was thus not inconsistent with Mejia's general defensive theory that there had been a struggle for the gun, which was accidentally and unintentionally discharged.

The central issue in the trial on Chico's murder was whether the killing was intentional or accidental. Far more damaging to Mejia's theory of an accidental shooting was Guzman's testimony of Mejia's attempt to shoot him and Silviano's testimony that he heard Figueroa warn everyone that Mejia had killed Chico and was going to kill Guzman. Silviano also testified that when Mejia was asked why he killed Chico, Mejia replied "I killed [Chico] because he sang it to me," which Silviano interpreted to mean

because Chico persistently tried to prevent Mejia from causing trouble with Guzman. The ballistics testimony also provided strong evidence upon which the jury could have rested its finding that the shooting was not accidental.

Thus, the volitional nature of the killing was established by evidence of Mejia's statements that was independent of, and less equivocal than, Figueroa's testimony. We conclude the jury's finding that the shots that killed Chico were fired intentionally rested firmly on evidence other than Figueroa's prior testimony. To the extent Figueroa's prior testimony provided evidence that the killing was intentional, the evidence was merely cumulative. Figueroa's testimony, being both ambiguous and equivocal, was harmless beyond a reasonable doubt.

II. *Jury Instruction on Self Defense Was Properly Refused*

Mejia alleges the trial court erred when it refused the requested instructions[6] on self-defense. Specifically, he contends the evidence would support a jury's finding that the shooting occurred because Mejia had an honest but unreasonable fear of imminent harm or death, which developed as a result of being in a drunken wrestling match over the pistol.

Circumstances that give rise to a duty to instruct on affirmative defenses, particularly the defense of self-defense, were reviewed in *People v. Elize* (1999) 71 Cal.App.4th 605 (*Elize*). "As to defenses, such as self-defense, the court must instruct sua sponte only if there is substantial evidence of the defense and the defense is not 'inconsistent with defendant's theory of the case.'" (*Id.* at p. 615 [quoting *People v. Breverman* (1998) 19 Cal.4th 142, 157].) "[I]n determining whether the record contains substantial evidence of a lesser included offense, the court should not consider the

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6 Mejia requested CALJIC Nos. 5.00, 5.01, 5.10, 5.12, 5.13, 5.15, 5.16, 5.17, 5.30, 5.50, and 5.51.

credibility of witnesses, instead leaving the credibility determination for the jury." (*Elize, supra,* 71 Cal.App.4th at p. 615.)

The facts of this case do not satisfy the requirement that there be substantial evidence of self-defense, nor can self-defense be seen as consistent with Mejia's theory of the case.

Mejia's theory of the case is clear: he was trying to take the pistol back to Chico's father, he and Chico started wrestling for possession of the pistol, and the pistol discharged accidentally which caused Chico's death. Mejia specifically denied pulling the trigger and specifically denied intentionally discharging the pistol.

Mejia's theory focuses on causation, not on the presence or absence of criminal intent. In other words, Mejia did not ask the jury to believe that he shot Chico because he had an honest but unreasonable fear of being hurt or killed; he asked the jury to believe that he did not shoot Chico at all. He asked the jury to believe the pistol was accidentally and unforeseeably discharged as a result of a struggle by each to get the pistol away from the other. Mejia did not mention, either in his own testimony or in closing arguments, that he killed Chico in the reasonable or mistaken belief that he needed to do so in order to protect himself.

Nor was there any substantial evidence of self-defense before the jury. At a minimum, Mejia would have to have testified to at least some subjective fear for his own safety. (See *People v. Humphrey* (1996) 13 Cal.4th 1073, 1093 [self-defense requires the defendant's subjective belief he is in imminent danger of death or great bodily injury].) The jury had absolutely no evidence that Mejia perceived any fear whatsoever.

We conclude there was neither reliance on self-defense nor substantial evidence to support that defense. Consequently, instruction on self-defense was not warranted and the trial court was not erroneous in refusing to give the requested instructions.

DISPOSITION

The judgment is affirmed.

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Cornell, J.

WE CONCUR:

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Dibiaso, Acting P.J.

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Gomes, J.